Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-610

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

M/V TORVANGER
and
WESTFAL LARSEN & CO., A/S,
*Petitioners*

v.

THE QUAKER OATS COMPANY,
*Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

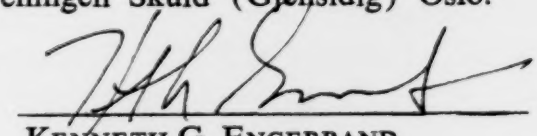
1. Under 46 U.S.C. § 1304(2)(m) which excepts an ocean carrier from liability due to the inherent vice of a cargo, must the ocean carrier prove the specific cause of the cargo damage, or may the carrier establish the probability of inherent vice, thus shifting the burden to the shipper of disproving the exception?

2. In reversing the district court, did the Court of Appeals for the Fifth Circuit err in holding that the ocean carrier must bear the burden of proof under the 46 U.S.C. § 1304(2)(m) inherent vice exception to the ocean carrier's liability?

## CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following parties have an interest in the outcome of this case.

1. Respondent, The Quaker Oats Company;
2. Tokio Marine & Fire Insurance Company, Ltd;
3. Petitioner, Westfal Larsen & Co., A/S; and
4. Assuranceforeningen Skuld (Gjensidig) Oslo.



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## RESPONDENT'S BRIEF IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 734 F.2d 238 and is included as Petitioner's Appendix C. The opinion of the United States District Court for the Southern District of Texas is reported at 1984 A.M.C. 171 and is included as Petitioner's Appendix A.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## STATUTE

The case involves the interpretation of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1976) and in particular, 46 U.S.C. § 1304(2)(m). The complete provisions of section 1304(2)(m) are set forth in Petitioner's Appendix E.

## STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the district court (Petitioner's Appendix A) and the court of appeals (Petitioner's Appendix C).

## ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit directly follows the precedents of this Honorable Court and is consistent with the decisions of the circuit courts of this country and with the opinions of other countries as well. The district court erroneously placed the burden of proof on cargo (Respondent Quaker Oats), contradicting these precedents, but the court of appeals reversed the district court and correctly placed the burden of proof on the vessel owner (Petitioner Westfal Larsen).

The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1976) (COGSA) governs the rights and liabilities of cargo (Quaker Oats) and the vessel owner (Westfal Larsen) in this case of damage to cargo carried from Kobe, Japan to Houston, Texas. 46 U.S.C. § 1300. As is frequently the case in cargo damage suits, resolu-

tion of the liability issue depends upon which party must ultimately bear the burden of proof. The district court correctly pointed this out: "Because no one knows what caused the cargo to form peroxides in the way it did, the COGSA burden-shifting mechanism determines the outcome of this case." (Petitioner's Appendix A at 5a) The district court erred, however, by holding that the vessel owner had rebutted cargo's prima facie case without proving how the damage occurred.

The district court found on undisputed evidence that the cargo of tetrahydrofuran was delivered to the custody of the vessel owner in good order and condition (peroxide level at 1/15 the maximum level specified in the purchase order). At the time the cargo was discharged, two of the three tanks in which the cargo was carried on the TORVANGER were still within the peroxide specification, but one of the tanks contained peroxides at approximately 5 times the maximum level. Thus, the district court correctly held that cargo had made out a prima facie case of liability, and the burden shifted to the vessel owner to show that the damage fell within one of the exceptions contained in 46 U.S.C. § 1304(2). The district court held that the vessel owner produced evidence that peroxide formation is an inherent vice of tetrahydrofuran[1] and evidence that the vessel owner "exercised due diligence to avoid any other possible causes of peroxide formation for which it would be responsible."[2] (Petitioner's Appendix A at 5a) Insofar as discharging the vessel

1. The carrier is not liable if it proves "Wastage in bulk or weight or any other loss or damage arising from inherent defects, quality, or vice of the goods." 46 U.S.C. § 1304(2)(m).

2. The carrier is not liable if it proves "Any other cause arising without the actual fault and privity of the carrier . . . ." 46 U.S.C. § 1304(2)(q).

owner's burden of proof, the district court found that the cargo had been inhibited from forming peroxides and a nitrogen "blanket" was maintained, since the presence of oxygen enhances the formation of peroxides in the cargo. The court conceded that *no one knew what caused the peroxides to form in this case* and the evidence on inherent vice presented by the vessel owner was "non-dispositive." (Petitioner's Appendix A at 5a-6a) The court did hold, however, that the vessel owner met its burden by augumenting *insufficient* evidence of inherent vice with evidence "negating other arguable causes" (Petitioner's Appendix A at 5a-6a) which were suggested or hypothesized by cargo. The result was a shift of the burden back to cargo to prove negligence of the vessel owner, which could not be done in the absence of evidence of the cause of the contamination.

The Court of Appeals for the Fifth Circuit correctly pointed out that the vessel owner bears the burden of proving an exception to cargo's prima facie case and that none of the exceptions to liability contained in COGSA had been proven by the vessel owner. Thus the burden of proof did not shift back to cargo to show that the vessel owner's negligence contributed to the damage. (Petitioner's Appendix C at 13a-15a) Quoting this Court's opinion in *Schnell v. The VALLESCURA*, 293 U.S. 296, 303 (1934), the Fifth Circuit cast the burden on the vessel owner to explain the unexplainable loss or suffer liability. (Petitioner's Appendix C at 19a) When the vessel owner was unable to explain the loss, a judgment for cargo was required. Before this Honorable Court the vessel owner argues that the Fifth Circuit improperly placed the burden of proof on the vessel owner to prove the specific cause of the damage to the cargo and that

cargo should have been required to disprove any inherent vice in the cargo.

The landmark case involving the burden of proof in cargo cases is *Schnell v. The VALLESCURA*, 293 U.S. 296 (1934). In *Schnell* this Honorable Court held that when cargo makes its prima facie case, the vessel owner has the burden to show "the immediate cause of the loss or injury is an excepted peril." *Id.* at 305. If the vessel owner cannot prove what caused the damage, he fails in his burden: "If he delivers a cargo damaged by causes unknown or unexplained, which has been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a prima facie case of liability." *Id.* This Court stated the policy grounds for imposing liability on the vessel owner as follows:

> The reason for the rule is apparent. He is a bailee intrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved of liability.

*Id.* at 303.

An example of the operation of the burden of proof is *The FOLMINA*, 212 U.S. 354 (1909) in which a cargo of rice was damaged by the unexplained entry of sea water. "There was no evidence tending to show any negligence, fault, or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated." *Id.*

at 360. No evidence was ever presented as to how the sea water entered the hold of the ship, which was of the highest class in Lloyd's Register. *Id.* As in the case at bar, the issue turned on the burden of proof, and the shipowner showed that the deck, the hull, the pipes, etc. were all carefully examined both before and after the damage. *Id.* No defect or fault was ever proven against the ship. *Id.* at 360-61. This Court consequently had to impose liability *against* the vessel because "so long as the cause remains undisclosed it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril." *Id.* at 362. The Court held:

> As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier.

*Id.* at 363.

The decisions from the United States circuit courts are consistent with that of the Fifth Circuit in the case at bar in interpreting the *Schnell* and *FOLMINA* decisions of this Court. In *Socony Mobil Oil Co. v. Texas Coastal and International, Inc.*, 559 F.2d 1008 (5th Cir. 1977), the Fifth Circuit dealt with a cargo of oil which was contaminated with water. When the defendant was unable to explain the cause of the contamination, the court imposed liability:

> If the evidence sufficiently demonstrates that the oil was "dry" when loaded in Venezuela, and had significant water content when discharged in Albany, the defendant was obliged to come forward and explain

> why. The explanation of the plaintiffs that it was due to a pilfering of cargo by the ship was a gratuitous one which they were not obliged to advance.

*Id.* at 1011.

The Court of Appeals for the Second Circuit has likewise imposed liability on the vessel owner when the cause of the cargo damage is "a mystery." *Nissho-Iwai Co. v. M/T STOLT LION*, 617 F.2d 907, 911 (2d Cir. 1980), *after remand*, 719 F.2d 34 (2d Cir. 1983). In that case a cargo of styrene monomer was carried from Texas to Japan, and some of the cargo was found to be discolored shortly after discharge. Following the rule that cargo only had to show discoloration at discharge, the court concluded that cargo made out a prima facie case of liability and that the vessel owner was liable because it could not prove it was free from fault.[3] 719 F.2d at 38.

In response to the cases cited above, the vessel owner in the case at bar argues that one of the enumerated

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3. The requirement that the carrier come forward and explain how the damage occurred has a much broader and international base of support than the few leading cases cited herein. *See, e.g.*, Compagnie De Navigation Fraissinet & Cyprien Fabre, S.A. v. Mondial United Corp., 316 F.2d 163, 170 (5th Cir. 1963): "In the void which the Carrier's absolute silence here creates the policy of the law reveals its wisdom: explain what took place or suffer the consequences." Madow Co. v. S. S. LIBERTY EXPORTER, 569 F.2d 1183, 1186 (2d Cir. 1978): "This proof shifts the burden to Ta Peng for an explanation of the damage if it is to avoid liability." North Star Cement Ltd. v. Labelle, 1976 A.M.C. 944, 948 (Fed. Ct. Canada 1975): "I therefore find that the defendant has failed to discharge the onus incumbent upon him of establishing that the unseaworthiness could not have been prevented by due diligence, since the full cause of the unseaworthiness itself remains unexplained." Pendle & Rivett, Ltd. v. Ellerman Lines, 29 Ll. L. Rep. 133, 136 (K.B. 1927): "I think the only logical result is that defeat must be on the side on which rests by this statute the burden of explaining that which would be otherwise inexplicable."

defenses in COGSA should be separated and given different treatment. Citing a decision from the United States District Court for the Southern District of New York,[4] the vessel owner argues that cargo should carry the burden of disproving inherent vice in order to make out a prima facie case. The support for the vessel owner's proposition originates in *The NEIL MAERSK,* 91 F.2d 932 (2d Cir.), *cert. denied,* 302 U.S. 753 (1937). In *The NEIL MAERSK* Judge Augustus Hand was presented with damage to a cargo of bags of deteriorated sardine meal. Some of the damage may have been attributable to bad stowage, but there was simply no evidence that the cargo was in good condition at the time it was loaded on the vessel. *Id.* at 934. Therefore cargo did not satisfy its initial burden so as to make out a prima facie case. Judge Hand was careful to distinguish this Court's decision in *Schnell* on the ground that the cargo in *Schnell* was assumed to be in good order and when shipped; whereas in *The NEIL MAERSK* there was no proof of the cargo's condition at loading. "Without proof of such condition, there would be no basis for calculating any damages caused by the carrier." *Id.*

Unlike *The NEIL MAERSK* and its progeny, in the case at bar Quaker Oats presented evidence of the good condition of its cargo at the time it was loaded on the TORVANGER, and the district court held that Quaker Oats made out a prima facie case. (Petitioner's Appendix A at 5a) The district court found the vessel owner's evidence on inherent vice to be "non-dispositive" (Petitioner's Appendix A at 5a), and the Fifth Circuit concluded that inherent vice was not proven because the cargo had been

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4. United States Steel Int'l, Inc. v. M. T. GRANHEIM, 540 F. Supp. 1326 (S.D.N.Y. 1982).

properly treated by an inhibitor and carried under a nitrogen blanket. (Petitioner's Appendix C at 15a n.3) Thus, even though some decisions from the Second Circuit have created a minor exception to the burden of proof scheme announced by this Court in *Schnell,* the exception is of no assistance to the vessel owner herein.

Petitioner finally contends that if the vessel owner offers evidence which demonstrates the probability that damage was caused by an inherent defect, then cargo should bear the burden of proving negligence of the vessel owner in order to impose liability. In support of this proposition the vessel owner cites the district court decision in *United States v. Central Gulf Steamship Corp.,* 340 F. Supp. 473 (E.D. La. 1972), *vacated,* 517 F.2d 687 (5th Cir. 1975). In *Central Gulf* the district court was presented with facts which established that the cargo of flour "was in all probability infested when it was received" by the vessel owner. *Id.* at 483. In that situation the district court concluded that cargo should have to prove the vessel owner was negligent in some way if it was to impose liability. *Id.* The court retreated, however, from requiring cargo to disprove inherent vice in order to sustain its initial prima facie case. Rather, the court held that the burden of showing negligence on the carrier does not devolve upon cargo "until the carrier has proven that the loss resulted from an excepted cause." *Id.* at 481. It was only because the vessel owner established facts "which make it more probable than not that the infestation was caused by an inherent vice or defect" that the district court required cargo prove negligence of the vessel owner. *Id.* at 482.

Even if the *Central Gulf* case is considered an exception to the burden of proof scheme set out in *Schnell* and

*The FOLMINA*, it is clear from the findings of the district court and court of appeals that the vessel owner in the case at bar has fallen far short of establishing the "probability" of inherent vice. Therefore, whether this Court follows its decisions in *Schnell* and *The FOLMINA* or the interpretations of them announced by some of the lower courts, cargo was entitled to a judgment in its favor and the court of appeals decision reversing the district court was proper.

As this Court has required in *Schnell* and *The FOLMINA*, the vessel owner was obliged to explain the cause of the cargo contamination. When the vessel owner presented no evidence on this matter, cargo was entitled to a judgment in its favor and the court of appeals was correct in so holding.

## CONCLUSION

Plaintiff proved a prima facie case of liability against the vessel owner by demonstrating that it delivered the cargo to the vessel in good condition and that the cargo was contaminated at discharge. The Fifth Circuit correctly placed the burden of proof on the vessel owner to explain the loss in accordance with the precedents of this Honorable Court. Wherefore, Petitioner Quaker Oats respectfully submits that this Honorable Court should

deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing Brief in Oppositon was served upon opposing counsel, Robert M. Julian, P. O. Box 79518, Houston, Texas 77279 on this the 20 day of December, 1984.

KENNETH G. ENGERRAND